STATE OF MICHIGAN

COURT OF APPEALS

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Plaintiff-Appellee,

v

WILLIAM SMITH and SHERI HARRIS,

Defendants,

and

SCOTT MIHELSIC and ANDREA MIHELSIC,

Defendants-Appellants,

and

PIONEER STATE MUTUAL INSURANCE COMPANY,

Intervening Defendant.

FOR PUBLICATION
March 16, 2010

No. 287505
Kent Circuit Court
LC No. 07-003903-CK

Advance Sheets Version

Before: MARKEY, P.J., and BANDSTRA and MURRAY, JJ.

MARKEY, P.J., (*dissenting*).

I respectfully dissent because I disagree with the majority's analysis of whether plaintiff complied with the statutory warning notice requirement of MCL 500.3009(2). I believe it did; consequently, I would affirm the trial court.

Before I proceed further, I must note that I do agree with the majority's rendition of the facts of this case and of the existing caselaw, including that this is a case of first impression. I also note that, like my colleagues, I too strongly adhere to the philosophy that it is this Court's function to apply the law as plainly written. It is not our job to modify, amend, or read into a statute something that is not there; such legislating from the bench is simply improper. Legislating belongs to the Legislature.

Nonetheless, on rare occasion there may arise a situation where following this philosophy with myopic rigidity effects not only a complete thwarting of the Legislature's intent but also a profoundly unfair and inequitable result. I believe that the narrow facts of this case and the majority's treatment of them create precisely that situation.

The purpose of MCL 500.3009(2) is to allow an insurer to exclude certain drivers from liability coverage. Clearly, that was the case here, and both the named insured, Sheri Harris, and the excluded driver, William Smith, as well as the insurer, Progressive Michigan Insurance Company, all understood and accepted that Mr. Smith was an excluded driver under the insurance policy issued to Ms. Harris.[1] This point is particularly important because Mr. Smith had such an atrocious driving record that he was no longer able to legally drive. Still, he purchased a vehicle, and in order to obtain license plates and insurance, he added his friend and the named insured, Ms. Harris, to the title. Insurance documents list them as part of the same household. Harris obtained the insurance with plaintiff, and Smith paid for it. A form with Ms. Harris' signature lists Mr. Smith as an excluded driver. Plaintiff's declarations page and its insurance policy list him as an excluded driver, as do the certificates of insurance. So, defendants Smith and Harris had four separate insurance documents explicitly advising and warning that Smith was an excluded driver.

Moreover, there appears to be *no dispute* that both Mr. Smith and Ms. Harris knew that Mr. Smith was a named excluded driver under this insurance policy. In fact, one cannot read this record and not completely recognize that both Mr. Smith and Ms. Harris knew that Mr. Smith was not insurable even before he purchased the truck he was driving when the accident occurred. And, Smith and Harris knew what they needed to do to obtain insurance covering the vehicle. Together, they set about to accomplish that task. Indeed, considering it was Smith's truck, and that he obviously drove it, one can only conclude that Smith and Harris colluded to obtain insurance from Progressive without concern that Smith was not supposed to drive the vehicle. So, under these facts, there is not the slightest concern that the *intent* that the Legislature had in enacting § 3009(2) was completely accomplished.

It is also true that Progressive would never have issued an insurance policy to Ms. Harris covering the vehicle if it knew that Mr. Smith would drive it. Progressive, in taking the application for insurance from Ms. Harris and obtaining the driver exclusion form from her pertaining to Mr. Smith, required that information and her implicit promise that Mr. Smith would not drive the vehicle when it calculated the fair and appropriate insurance premiums for the vehicle. Insurance companies must have some knowledge in order to compute premiums, and it is not fair, practical, or reasonable to expect insurance companies to either act in the dark or be required to assume that their named insureds are lying. Quite the contrary, an insurance company must be allowed to generally accept as true and accurate whatever information its named insured gives to it when completing an insurance application.

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[1] In his deposition, Mr. Smith stated that he "definitely" knew he should not have been driving on the day of the accident. Ironically, Ms. Harris was a passenger in the truck at the time of the accident.

MCL 500.3009(2) mandates that its warning notice of the effect of the named driver exclusion be placed on various documents. Here, again, no one disputes that Progressive placed the required warning notice on the declarations page, on the insurance policy itself, and on the certificates of insurance. There is only one very narrow issue: whether Progressive's substitution of one word, "liable," for another word, "responsible," in one sentence renders the notice requirement completely null and void and thereby vitiates the named driver exclusion. The majority believes that Progressive's substitution of "responsible" for the word "liable" does just that. Consequently, under the majority's analysis, Progressive bears the full responsibility for an accident caused by a driver that everyone involved, i.e. the insurance company, the named insured, and the excluded driver, knew that the consequence of his driving and causing an accident would be no insurance coverage.

The specific language of MCL 500.3009(2) is, again:

> Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable.

In this case, the warning on the declarations page of plaintiff's policy mirrors verbatim the statutory language; however, the warning on both the face of the policy itself and on the certificates of insurance contains the word "responsible" instead of "liable" as the very last word in the warning. But the certificates of insurance themselves go above and beyond providing the statutory notice. On their reverse sides, they also state:

> **Named Excluded Driver:**
>
> If this vehicle is driven by the person named below, residual liability insurance does not apply and the vehicle will be considered uninsured.
>
> WILLIAM SMITH

According to Black's Law Dictionary (8th ed), the word "liable" means both "[r]esponsible or answerable in law; legally obligated," and "subject to or likely to incur (a fine, penalty, etc.)." The word "responsible" means "[l]iable; legally accountable or answerable." Black's Law Dictionary (6th ed).

Patently, the words "liable" and "responsible" are completely and totally synonymous. See *In re Beck*, 287 Mich App 400, 403; ___ NW2d ___ (2010), wherein this Court determined that "[a] 'responsibility' . . . is a 'liability.'" (Quoting Black's Law Dictionary [7th ed].) Indeed, it could even be surmised or argued that Progressive used the word "responsible" instead of "liable" in two of its required notices because it is more readily comprehendible. The average lay person is very unlikely to misunderstand what it means to be "fully personally responsible." On the other hand, the word "liable" has more legal sounding connotations. So, should even those of us who strongly believe that statutes must be strictly complied with go so far as to vitiate a named driver exclusion because of the use of one synonym under the unequivocal facts of this case? Must we as strict constructionists abandon "common sense" and render a decision not

only remarkably hyper-technical legally but also profoundly unjust and jarring to what I will presume to say is the average person's sense of justice and fair play? I think not.

I believe that Progressive Michigan Insurance Company compiled with the mandate of § 3009(2) and the named driver exclusion of Progressive's policy remained fully effective. It is our responsibility to give effect to the interpretation that accomplishes the statute's purpose. *People v Adair*, 452 Mich 473, 479-480; 550 NW2d 505 (1996). The choice of "liable" versus "responsible" does not in any way frustrate the Legislature's intent to ensure that strong warning be provided as to the import of an excluded driver provision. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the Legislature's intent. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). Here, upholding the exclusion where the warning notice substitutes one word for its synonym fulfills the Legislature's intent. It is also fair to assume that the Progressive policy

> was approved by the Commissioner of [the Office of Financial and Insurance Regulation]. MCL 500.2236 requires that basic insurance policy forms be filed with the Commissioner's office and be approved by the Commissioner before the policy may be issued by the insurance company. See also, *Rory v Continental Insurance Company*, 473 Mich 457, 474; 703 NW2d 23 (2005). Subparagraph (5) of this statute provides:
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> "(5) Upon written notice to the insurer, the commissioner may disapprove, withdraw approval or prohibit the issuance, advertising, or delivery of any form to any person in this state if it violates any provisions of this act, or contains inconsistent, ambiguous, or misleading clauses, or contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy. The notice shall specify the objectionable provisions or conditions and state the reasons for the commissioner's decision. If the form is legally in use by the insurer in this state, the notice shall give the effective date of the commissioner's disapproval, which shall not be less than 30 days subsequent to the mailing or delivery of the notice to the insurer. If the form is not legally in use, then disapproval shall be effective immediately." (Emphasis added.)
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> By implication the Commissioner of Insurance has determined that Progressive's notice language does not unreasonably or deceptively affect the risk assumed by the coverage. This is somewhat persuasive that the policy's notice complies with the legislative intent of MCL 500.3009(2). *Cruz v State Farm Mutual Auto Insurance Company*, 241 Mich App 159, 167; 614 NW2d 689 (2000). I.e., "responsible" is synonymous with "liable."[2]

[2] Letter from Progressive's attorney Kerr L. Moyer to the trial court dated August 4, 2008.

Consequently, since Mr. Smith was driving the vehicle in knowing defiance of that exclusion and was the cause of the accident at issue, there is no insurance coverage under Progressive's policy. So, although my analysis is somewhat different from that of the trial court, I believe the trial court reached the correct conclusion and properly granted Progressive's motion for summary disposition.

I would affirm the judgment of the trial court.

/s/ Jane E. Markey